the state or of third parties require that in regard to their respective rights in the particular case strangers should deal with corporations at the peril of the transaction's being *ultra vires?* This view would make it clear that constructive notice is not, like actual knowledge, a reason in itself for defeating an otherwise innocent stranger and would avoid the mental entanglement inevitably involved in attributing constructive notice of the charter to an outsider in order to postpone him to *intra vires* creditors, and yet in the same transaction treating him as innocent in order to prefer him to the stockholders.[12] By imposing, whenever public policy demands, duties [13] to look out for the state's interest in such cases as banking transactions, or the interest of *intra vires* creditors,[14] and by applying the common-law rules as to limitations on the authority of an agent,[15] the just results of the constructive notice doctrine are obtained without its misapplications, or the sacrifice of logic. The term "constructive notice" may have had a legitimate meaning in this branch of the law, but it would now seem wiser to abandon it in the interest of clarity of thought.

THE LIABILITY OF AN AGENT OF A CORPORATION FOR ITS ULTRA VIRES CONTRACTS. — If an agent, at the request of the proper officers of a corporation, makes a contract for the corporation which is beyond its powers and upon which it cannot be held, the authorities are divided as to whether or not the outsider can hold the agent personally responsible for any loss that may result.[1] The only basis for holding the agent, in the absence of a conscious misrepresentation, is upon an implied warranty either of his own authority or the capacity of his principal.

It is sometimes said that a corporation cannot have an agent to do an

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[12] See *In re* Birkbeck Permanent Benefit Building Society, [1912] 2 Ch. 183. This case probably represents the climax in the application of constructive notice. A company with 250 shares distributed largely among the directors did an enormous *ultra vires* banking business extending over fifty years. It failed with deposits totaling £16,000,000. *Intra vires* creditors were justly enough paid first. The shareholders then received the par value of their shares and the depositors were allowed the balance although the court confessed it was illogical to allow them anything.

[13] Concerning duty as the basis of complaint of *ultra vires* acts, see Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 209, 13 S. W. 822, 827.

[14] See 23 HARV. L. REV. 495.

[15] The cases often seize on constructive notice of the charter to explain the failure of a contract because of a limitation on an agent's authority, but the common-law rules of agency would seem to cover most of the cases. See Ernest *v.* Nicholls, *supra;* Fountaine *v.* Carmarthen Ry. Co., *supra.*

[1] The authorities divide about evenly upon this point. The following cases hold the agent liable: Seeberger *v.* McCormick, 178 Ill. 404, 53 N. E. 340; Trust Co. *v.* Floyd, 47 Oh. St. 525, 26 N. E. 110; Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92; Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552. See Vliet *v.* Simanton, 63 N. J. L. 458, 468, 43 Atl. 738. The following cases hold that the agent is not liable to the outsider: Thilmany *v.* Iowa Paper Bag Co., 108 Ia. 357, 79 N. W. 261; Sandford *v.* McArthur, 18 B. Mon. (Ky.) 411; Humphrey *v.* Jones, 71 Mo. 62; Abeles *v.* Cochran, 22 Kan. 405.

The liability of directors of a corporation is a different question. It seems just that they should be charged with the duty of knowing the extent of the powers of the corporation, and if an outsider cannot hold the corporation on a contract which the directors have induced him to make, he should be allowed to hold them.

ultra vires act. From this it would follow that no agent could have authority to do such an act, and any assumption on his part to make an *ultra vires* contract would subject him to liability for breach of implied warranty of his authority. All courts agree, however, that a corporation may be liable for the torts and crimes of its agents. In the United States, at least, the corporation may be liable in certain cases if the tort occurs during an *ultra vires* undertaking.[2] So also it may be held on an accommodation note although issued *ultra vires* by an agent.[3] It would therefore seem that a corporation did have capacity to appoint an agent to do an *ultra vires* act. And if the proper officers of the corporation instruct the agent to make the contract, his authority would seem to exist in fact and there would be no breach of implied warranty of authority.

The only other ground upon which the agent could be made liable is that he warranted the capacity of his principal to be bound upon the *ultra vires* contract. Assuming, as is held by some courts, that a corporation's non-liability on *ultra vires* contracts results from a lack of capacity,[4] it has not yet become established in our law that an agent in general warrants his principal's capacity. Such a doctrine would seem an unwarranted extension of the doctrine of Collen *v.* Wright.[5] Certainly no court would say that an innocent agent warranted that his principal would not interpose any defenses to the contract, or that the principal was solvent. There seems little more reason to hold that the agent warrants the capacity of his principal. A recent case, however, follows the holding in a few jurisdictions that the agent does warrant the corporation's capacity.[6] *Raff* v. *Isman*, 84 Atl. 352 (Pa., Sup. Ct.). But these decisions have little weight as bearing on the general question, because in all of them, including the principal case, the agent knew of the lack of capacity.

But even if the agent be held to warrant capacity, it is submitted that the same reasons which prevent a recovery against the corporation should in most cases prevent recovery from the agent. If, as in England, the court in imputing constructive notice of the limitations of the charter to all persons dealing with the corporation,[7] treats it as if it were

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[2] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177, 35 N. E. 776; Gruber *v.* Washington & Jamesville R. Co., 92 N. C. 1; Southern Express Co. *v.* Platten, 93 Fed. 936; Ramsden *v.* Boston & Albany R. Co., 104 Mass. 117; Brokaw *v.* New Jersey R. & Transportation Co., 32 N. J. L. 328; New York & New Haven R. Co. *v.* Schuyler, 34 N. Y. 30. *Cf.* Salt Lake City *v.* Hollister, 118 U. S. 256, 6 Sup. Ct. 1055. In England it seems that a corporation is liable for a tort committed in an *intra vires* business. Goff *v.* Great Northern Ry. Co., 30 L. J. Q. B. 148. But not if committed in an *ultra vires* undertaking. Poulton *v.* London & Southwestern Ry. Co., L. R. 2 Q. B. 534. For other authorities, see 24 HARV. L. REV. 543.

[3] Monument National Bank *v.* Globe Works, 101 Mass. 57.

[4] *Re* Phoenix Life Assurance Co., 2 Johns. & H. 441; Ashbury Railway Carriage & Iron Co. *v.* Riche, L. R. 7 H. L. 653; Central Transportation Co. *v.* Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478.

[5] 8 E. & B. 647. Whether the agent of a married woman warrants her capacity is not clear as a matter of authority, since there was actual fraud by the agent in the only case upon the subject. Edings *v.* Brown, 1 Rich. (S. C.) 255. A recent English case squarely decides that the agent of a lunatic warrants his principal's capacity. Yonge *v.* Toynbee, [1910] 1 K. B. 215. See also Drew *v.* Nunn, 4 Q. B. D. 661, 666.

[6] Trust Co. *v.* Floyd, 47 Oh. St. 525, 26 N. E. 110; Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92; Seeberger *v.* McCormick, 178 Ill. 404, 53 N. E. 340.

[7] Ridley *v.* Plymouth Grinding & Baking Co., 2 Exch. 711.

equivalent to actual knowledge, there can be no reliance on the agent and hence no warranty.[8] It is true that if the only ground for refusing recovery is lack of capacity to contract imposed by the legislature, and the agent warrants that capacity, he should be personally liable. But it is difficult to reconcile this view with the corporation's liability for the torts and crimes of its agents, and no court seems to refuse recovery on this ground alone. On the other hand, if a corporation is relieved on the ground that its *ultra vires* contracts are so illegal that even an innocent party cannot sue on them, there seems less cause to allow recovery against another innocent party on rights arising from the same transaction.[9] If, as seems the most desirable view, recovery is denied only when a real public policy discourages the particular transaction,[10] it would seem that the same policy would equally prevent the creation of all rights and liabilities.

THE USE OF ANCIENT DOCUMENTS IN EVIDENCE. — The fact that a document is ancient affects its availability in evidence in several ways. In the first place the admission of such a document under certain conditions is allowed without extrinsic proof of its execution and authorship. The principal support in reason for this exception to the general rule is necessity. After many years it may be impossible to produce the author, proof of his handwriting, witnesses of the execution, or any evidence bearing on the genuineness of the document. There is also a probability that instruments in writing are what they purport to be, particularly if formal in nature. While this is not enough in modern documents, in one which has remained so long where a genuine one would be expected, the cumulative evidence of its probable validity is sufficiently weighty not to require further proof. To qualify for admission under the rule, the document must be over thirty years old, must come from a natural custody, and there must be nothing suspicious about its appearance.[1] A further requirement sometimes imposed, if it is a deed or will, is that there must be possession of land according to its terms, to give it some corroboration.[2] But to-day the weight of authority seems against that requirement;[3] in other cases it has been modified by allow-

[8] If the doctrine of constructive notice were similar to that of constructive notice of incumbrances, and imposed solely for the benefit of third parties, liability of the agent on an implied warranty would not be excluded because it would injure no third parties.

[9] St. Louis, Vandalia & Terre Haute R. Co. *v.* Terre Haute & Indianapolis R. Co., 145 U. S. 393, 12 Sup. Ct. 953.

[10] See 23 HARV. L. REV. 495; 24 *id.* 534. At the present time no court will enforce an *ultra vires* contract which is wholly executory. Garrett *v.* Kansas City Coal Mining Co., 113 Mo. 330, 20 S. W. 965; Jemison *v.* Citizens' Savings Bank, 122 N. Y. 135, 25 N. E. 264; Simpson *v.* Building and Savings Association, 38 Oh. St. 349.

[1] This is the rule laid down in all the cases. Applegate *v.* Lexington & Carter County Mining Co., 117 U. S. 255, 6 Sup. Ct. 742; Woodward *v.* Keck, 97 S. W. 852 (Tex. Civ. App.). Proper custody was not shown in Swafford *v.* Herd's Adm'r, 23 Ky. L. Rep. 1556, 65 S. W. 803; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017. The appearance was suspicious in Wright *v.* Hull, 83 Oh. St. 385, 94 N. E. 813; O'Neal *v.* Tennessee Coal, Iron & R. Co., 140 Ala. 378, 37 So. 275.

[2] McKinnon *v.* Bliss, 21 N. Y. 206; Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292.

[3] Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; Nicholson *v.* Eureka Lumber Co., 156 N. C. 59, 72 S. E. 86; Harlan *v.* Howard, 79 Ky. 373.